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No. 99-418

Supreme Court, U.S.
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In The

# Supreme Court of the United States

JOSE MARTIN AVELAR-CRUZ and GARY LAGUERRE,

*Petitioners,*

v.

JANET RENO, Attorney General, et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## REPLY BRIEF FOR THE PETITIONERS


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## REPLY BRIEF FOR THE PETITIONERS

Since the filing of the Petition for Writ of Certiorari, four more circuits have addressed the issues in this case. The opinion of the Seventh Circuit now squarely conflicts with the holdings of ten other courts of appeals on the jurisdiction of the federal courts and with seven other courts of appeals on whether a new mandatory deportation provision affecting thousands of longtime lawful permanent residents of the United States applies retroactively. The First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits have all expressly held that the district courts retain habeas corpus jurisdiction under 28 U.S.C. 2241 to review the identical constitutional and statutory claims presented by petitioners Avelar-Cruz and LaGuerre. The First, Second, Third, Sixth, Eighth, Ninth and Eleventh Circuits have also rejected the Attorney General's ruling in *Matter of Soriano*, Int. Dec. No. 3289 (AG Feb. 21, 1997), that AEDPA 440(d) deprives legal resident immigrants who were in deportation proceedings when AEDPA was enacted of their eligibility for deportation relief under 8 U.S.C. 1182(c) (1994) (repealed 1996).[1] On both issues, only the Seventh Circuit has ruled to the contrary.

The judgment of the court of appeals should be vacated and remanded in light of this Court's intervening retroactivity decision in *Martin v. Hadix*, 119 S. Ct. 1998 (1999), as well

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[1] *See Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998), *cert. denied*, 119 S. Ct. 1140 (1999); *Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998), *cert. denied sub nom. Reno v. Navas*, 119 S. Ct. 1141 (1999); *Sandoval v. Reno*, 166 F.3d 225 (3d Cir. 1999); *Bowrin v. INS*, 194 F.3d 483 (4th Cir. 1999); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299 (5th Cir. 1999); *Pak v. Reno*, 196 F.3d 666 (6th Cir. 1999); *Shah v. Reno*, 184 F.3d 719 (8th Cir. 1999); *Magana-Pizano v. INS*, No. 97-15678, 1999 WL 1249703 (9th Cir. Dec. 27, 1999); *Jurado-Gutierrez v. Greene*, 190 F.3d 1135 (10th Cir. 1999); *Mayers v. INS*, 175 F.3d 1289 (11th Cir. 1999). Three circuits – the Fourth, Fifth and Tenth – upheld habeas corpus jurisdiction but did not address the application of AEDPA 440(d) to immigrants *in deportation proceedings* when AEDPA was enacted.

as the Seventh Circuit's own subsequent jurisdictional decisions contradicting the ruling in this case. Alternatively, plenary review should be granted to resolve the lopsided circuit split on whether AEDPA 401(e) and 440(a) repealed habeas corpus jurisdiction under 28 U.S.C. 2241 and whether AEDPA 440(d) applies to pending immigration proceedings.

## I. The Opinion Should be Vacated and Remanded in Light of *Martin v. Hadix* and in Light of the Seventh Circuit's Subsequent Jurisdictional Rulings.

The judgment of the court of appeals should be vacated and remanded for reconsideration based on two separate and independent grounds. First, the court of appeals' conclusion on the merits that AEDPA 440(d) applies retroactively to immigration proceedings already pending when AEDPA was enacted is inconsistent with the retroactivity analysis in this Court's recent decision in *Martin v. Hadix*. Second, the court of appeals' jurisdictional ruling that litigants who filed habeas corpus petitions under the Seventh Circuit's prior precedents are left with no avenue for judicial review is inconsistent with the Seventh Circuit's own subsequent decisions. Both grounds warrant a remand, but either alone is sufficient.

### 1. Merits.

The government opposes remand of the merits based on its contentions that *Hadix* supports the court of appeals' retroactivity analysis, Br. in Opp. at 15; that a remand in light of *Hadix* would "serve no purpose" since the court of appeals held that it lacked jurisdiction and therefore cannot re-examine the merits, Br. in Opp. at 15, 24; and that subsequent Seventh Circuit cases have reiterated that AEDPA 440(d) applies retroactively; Br. in Opp. at 17-18.

a. *Hadix* supports petitioners' contention – and the holding of seven other circuits – that AEDPA 440(d) does not apply to immigration proceedings that were pending when

AEDPA was enacted. *Hadix* makes clear that whether a statute has "retroactive effect" is an intensely practical determination that "demands a common sense, functional judgment" of whether a law attaches new legal consequences to events completed before its enactment. *Hadix*, 119 S. Ct. at 2006. The Court resolved the retroactivity question in *Hadix* by carefully considering and specifically addressing the actual reliance of the plaintiffs on prior law and by determining whether the plaintiffs had taken any "irrevocable" action in reliance on the law before it was changed. Based on a review of actual practice and conduct, *Hadix* held that the new provision had an impermissible "retroactive effect" on acts (*i.e.*, attorney work hours) occurring before the change in law, but not on acts occurring afterwards. *Id.* at 2006-07.

The careful *Hadix* analysis is precisely what the court of appeals failed to undertake in this case. Instead of assessing how the criminal plea process actually functions for immigrants, the factors that they consider in that setting, and the irrevocable nature of their pre-AEDPA guilty pleas, the opinion simply dismissed petitioners' reliance claim as "absurd." Pet. App. at 11a. The court of appeals did not address the fact that structuring a guilty plea to preserve eligibility for Section 1182(c) relief was common among immigrants and defense attorneys before AEDPA because eligibility depended on the length of the sentence and the nature of the conviction.[2] *Compare Magana-Pizano*, 1999 WL 1249703, at *8 (detailing relevance of eligibility for Section 1182(c) to immigrant guilty pleas and noting mandatory procedures for advising immigrant defendants of immigration consequences of guilty plea).[3]

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[2] Before AEDPA, only convictions for "aggravated felonies" where the immigrant served five years or more in prison would render the individual ineligible.

[3] *See also Wallace v. Reno*, 24 F. Supp.2d 104, 110 (D. Mass. 1998), *aff'd*, 194 F.3d 279 (1st Cir. 1999); *Mojica v. Reno*, 970 F. Supp. 130, 177 (E.D.N.Y. 1997), *aff'd in part, dismissed in part sub nom. Henderson v. INS*, 157 F.3d 106 (2d Cir. 1998), *cert. denied sub nom. Reno v. Navas*, 119

A guilty plea entered before the passage of AEDPA is plainly an "irrevocable" act occurring before the law changed to which AEDPA attaches new legal consequences, namely, ineligibility for discretionary relief. Under *Hadix*, that constitutes a retroactive effect. Indeed, two circuit courts cited *Hadix* in resolving the temporal scope of AEDPA 440(d) in favor of the majority view that AEDPA does *not* apply to immigrants who were in proceedings when AEDPA was enacted. *See Wallace v. Reno*, 194 F.3d 279, 286 (1st Cir. 1999) (citing *Hadix*); *Magana-Pizano*, 1999 WL 1249703, at *7 (same).

The government does not dispute that this Court's *Hadix* opinion constitutes an intervening decision on retroactivity that the court of appeals did not consider. Rather, the government argues that *Hadix* supports the court of appeals' retroactivity ruling. Br. in Opp. at 27. That conclusory assertion confirms the relevance of *Hadix* and indicates only that the government may press its current interpretation of 440(d) if the case is remanded. The existence of conflicting views on the effect of an intervening Supreme Court decision is precisely the purpose of a remand – to allow the court of appeals to address the parties' arguments in the first instance and to reconsider whether its ruling should be altered in light of a relevant pronouncement by this Court.

b. Contrary to the government's contention, the fact that the court of appeals dismissed petitioners' habeas corpus actions for lack of jurisdiction does not mean that a remand on the merits in light of *Hadix* would "serve no purpose." Br. in Opp. at 15. As reflected in our Petition for Certiorari, the court of appeals effectively rendered two jurisdictional rulings. The broader holding, that AEDPA repealed Section 2241 and placed exclusive review in the court of appeals, is the basis on which petitioners seek plenary review. *See* Point II,

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S. Ct. 1141 (1999); Pet. Br. at 27. *See generally* Kurzban, "The Immigration Act of 1990," *The Champion* (National Association of Criminal Defense Lawyers) (April 1991), at 7. An *amici curiae* brief by numerous criminal defender associations addressing this specific point was rejected by the court of appeals in this case.

*infra;* Pet. Br. at 22-23. The second and narrower jurisdictional ruling is the circuit court's decision to apply the repeal of Section 2241 to these petitioners (who simply followed the circuit's prior precedent) and to leave them with no avenue for judicial review. As explained below, that dismissal for lack of jurisdiction was inextricably linked to the court's resolution of the merits claim. Therefore, if the circuit court alters its view on the merits in light of *Hadix,* it would necessarily have to re-examine the jurisdictional ruling as well.

The government does not dispute that before the ruling in this case the Seventh Circuit had held that it no longer had jurisdiction over petitions for review filed by petitioners like these. Br. in Opp. at 15-16. Nor does the government dispute that the ruling in this case *requires* litigants to pursue the very procedure that the Seventh Circuit had previously *prohibited* (*i.e.*, a petition for review), or that the court of appeals then applied that new requirement to these petitioners, or that the petitioners could not comply because the 30-day filing deadline had passed. Pet. App. at 4a, 10a.

Under the court of appeals opinion, a litigant may be deprived of his or her right to judicial review (including review of a constitutional claim) by a jurisdictional "shell-game" where the circuit court adopts successive and contradictory rulings that ultimately cause a litigant to lose the ability to comply with any of those rulings. Neither the government nor the court of appeals suggests that such a rule reflects a defensible jurisdictional principle.

Instead, the court and respondents defend the jurisdictional *result* solely on the basis that the petitioners would have lost on the merits in any event and that a dismissal for lack of jurisdiction was therefore inconsequential. Thus, the court of the appeals and the government assert that the jurisdictional outcome is defensible *precisely because* the court determined that the *merits* should be decided adversely to the petitioners. Pet. App. at 10a (denial of jurisdiction did not matter because petitioners "would not have prevailed [on the merits] even if they hadn't dropped the jurisdictional ball");

Br. in Opp. at 17 (court of appeals "avoided any seeming unfairness" by examining merits).

Therefore, because the court of appeals' decision to apply the repeal of Section 2241 to these petitioners explicitly rests on its finding that petitioners would have lost on the merits had there been jurisdiction, the correctness of the court's merits ruling is necessarily outcome-determinative here. If reconsideration under *Hadix* entitles petitioners to prevail on the merits, then the court of appeals must also re-evaluate the jurisdictional dismissal.

c. The government's reliance on the circuit's later opinions reiterating the retroactivity (and equal protection) rulings disregards that the *LaGuerre* opinion is the Seventh Circuit's seminal ruling on the temporal scope (and constitutionality) of AEDPA 440(d), that the later decisions all rely on *LaGuerre*, and that the Seventh Circuit has never considered *Hadix* in any of its opinions. All of the Seventh Circuit cases cited by the government simply echo the holding in this case and do not consider *Hadix*.[4] Therefore, a remand of this case in light of *Hadix* will require reconsideration of the Seventh Circuit's decision on which all its subsequent rulings rest. There is no reason to assume that a *Hadix* remand would be disregarded by the court of appeals simply because later panels followed the pre-*Hadix* decision in this case.

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[4] In *Turkhan v. Perryman*, 188 F.3d 814 (7th Cir. 1999) (*"Turkhan II"*), on which the government principally relies, Br. in Opp. at 17, the court of appeals expressly relied – in the very language the government cites – on the merits ruling *in this case* and referred to it as the holding of *LaGuerre*. *See Turkhan II*, 188 F.3d at 827 ("we held [in *LaGuerre*] that AEDPA § 440(d) applies retroactively to bar covered criminal aliens from seeking a discretionary waiver of deportation under § [1182(c)]"). *See also id.* at 825-26 (citing *LaGuerre*). *See also Musto v. Perryman*, 193 F.3d 888, 891 (7th Cir. 1999) (relying on *LaGuerre*); *Chow v. Reno*, 193 F.3d 892, 893-94 (7th Cir. 1999) (*"Chow II"*) (same).

**2. Jurisdiction.**

The judgment dismissing petitioners' claims for lack of jurisdiction should also be vacated and remanded in light of later Seventh Circuit jurisdictional rulings. These rulings held that petitioners who relied on the unambiguous circuit precedent *barring* petitions for review should not be subjected to the circuit's new rule *requiring* such petitions if the deadline for filing has passed. Pet. Br. at 20-21. That is precisely the situation of these petitioners. Nonetheless, the government opposes a remand on jurisdiction based on its contentions that the Seventh Circuit's subsequent jurisdictional rulings are distinguishable, Br. in Opp. at 16; that an intra-circuit conflict does not warrant this Court's review, Br. in Opp. at 17; and that the petitioners suffered no unfairness because the opinion (and subsequent Seventh Circuit cases) examined the merits and rejected petitioners' claims. Br. in Opp. at 17.

a. As discussed in our Petition, the Seventh Circuit has recognized in subsequent decisions that the new jurisdictional ruling requiring petitions for review should not apply to bar jurisdiction of claims raised in habeas corpus petitions filed in response to the circuit's earlier – and contrary – precedent prohibiting petitions for review. *See Singh v. Reno,* 182 F.3d 504 (7th Cir. 1999)*; Turkhan II;* Pet. Br. at 21-22. The petitioners here are identically-situated in all relevant respects to the petitioners in *Singh* and *Turkhan II*, and the government offers no principled reason for applying a different rule to them.[5]

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[5] The government attempts to distinguish *Singh* by saying without explaining that it concerned "unusual circumstances" and a procedural due process claim, Br. in Opp. at 16 n.6, but neither the circumstances of Singh's case nor the nature of his claim distinguish that case for purposes of jurisdiction. Likewise, *Turkhan II* cannot have turned on the fact that Turkhan actually filed a petition for review that was dismissed, Br. in Opp. at 16 n.6, because *Turkhan II* applied the rationale of *Singh*, in which no petition for review had ever been filed. Nor would such a distinction make sense. *See* Pet. Br. at 21 n.14. In any event, the government's arguments for

b. Contrary to the government's argument, Br. in Opp. at 16-17, a remand order to resolve the intra-circuit conflict presented by this case fits easily within the Court's "broad power to GVR" under 28 U.S.C. 2106 (1999). *See Lawrence v. Chater*, 516 U.S. 163, 166 (1996). As this Court explained in *Lawrence*, "GVR conserves the scarce resources of this Court that might otherwise be expended on plenary consideration . . . and alleviates the 'potential for unequal treatment' that is inherent in our inability to grant plenary review of all pending cases raising similar issues." *Lawrence*, 516 U.S. at 167 (citation omitted).[6]

c. The government contends that there is no reason to remand on jurisdiction because the court of appeals made clear that petitioners would not have prevailed on the merits had the court found jurisdiction. As discussed above, the court of appeals may alter its view of the merits on remand in light of *Hadix*. But even if this case is remanded only on the jurisdictional question and not on the merits, a remand would serve a clear purpose – to afford the petitioners an explicit holding on the merits, which the government contends is necessary for this Court to exercise plenary review over this case. Thus, while petitioners contend that the Court can grant plenary review at this time on both the jurisdictional and merits questions, petitioners do not oppose a remand solely on jurisdiction if a more explicit holding on the merits is necessary. Especially in light of *Hadix* and the circuit split on retroactivity, these petitioners (and others in the Seventh Circuit) should not be subjected to mandatory deportation without an unambiguous – and reviewable – ruling on their claims.

In relation to this case as a whole, the government's position would deny petitioners all review of any claim.

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distinguishing *Singh* and *Turkhan II* should be directed to the court of appeals on remand.

[6] *Wisniewski v. United States*, 353 U.S. 901 (1957), cited by respondents, Br. in Opp. at 17, involved not a GVR but an attempted certification by a circuit court.

Relying on a "Catch-22" argument, respondents seek to insulate the merits from review on the ground that the court lacked jurisdiction, and seek to insulate the jurisdictional ruling on the ground that the court examined the merits. A remand on one or both issues avoids the impermissible result of that argument.

## II. Alternatively the Court Should Grant Plenary Review on Jurisdiction and the Merits.

The split in circuit authority warrants this Court's plenary review, and the importance of the issues is not diminished by the fact that this case does not arise under the newly-instituted "removal" framework. For immigrants in the Seventh Circuit, who are the *only* longtime legal residents in the Nation subject to mandatory deportation based on the retroactive application of AEDPA 440(d), there is nothing "transitional" about this case. The court of appeals decision permanently resolves their rights under our immigration laws, and the consequence for them is banishment from the United States pursuant to an interpretation of the law that applies nowhere else in the country.

The number of individuals affected is substantial because the Seventh Circuit encompasses Illinois, a state with one of the largest immigrant populations in the country.[7] The INS previously argued to this Court that resolution of the temporal scope of Section 440(d) could affect as many as 77,000 immigrants nationwide, and that even under the most conservative calculations, the temporal scope of Section 440(d) would affect an estimated 8,000 pending immigration cases.[8]

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[7] Illinois had 457,000 legal permanent residents in 1996 and Indiana and Wisconsin together had 100,000. *See* "State Population Estimates: Legal Permanent Residents and Aliens Eligible for Naturalization," Immigration and Naturalization Service (Nov. 20, 1996).

[8] *See* Petition [of INS] for Writ of Certiorari, *INS v. Magana-Pizano*, No. 98-836, at 25; Petition [of Attorney General] for Writ of Certiorari, *Reno v. Navas*, No. 98-996, at 24-25.

The importance of national uniformity on eligibility for relief from deportation for legal permanent residents is further underscored by the government's statement that the Attorney General has "under consideration" a number of administrative proposals for responding to the circuit court opinions that have rejected her *Soriano* ruling. Br. in Opp. at 25. The tentative nature of the government's representation suggests that administrative action is far from certain. Therefore, absent plenary review (or remand) by this Court, immigrants who would be eligible for relief in other circuits will continue to be denied relief and deported in the Seventh Circuit.

## CONCLUSION

The writ should be granted and the judgment vacated and remanded to the court of appeals in light of *Martin v. Hadix* and in light of subsequent developments in the Seventh Circuit, or the case should be accepted for plenary review.

Respectfully submitted,

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